

No. 16085 ✓

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

EUGENE C. DREW,

Appellee.

Supplemental
Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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United States Court of Appeals
for the Ninth Circuit

No. 16085

UNITED STATES OF AMERICA,

Appellant,

vs.

EUGENE C. DREW,

Appellee.

Appeal From the United States District Court for
the Northern District of California, Southern
Division.

Before: Orr, Hamley and Merrill, Circuit Judges.

ORDER

An examination of the record filed in this case discloses that there are no findings of fact and conclusions of law included therein as required by Admiralty Rule 46½, 28 U.S.C.A.

It is ordered that the district court make findings of fact and conclusions of law and that the same be transmitted to the clerk of this court as a supplement to the record in this case. Subsequent to the amendment of the record as aforesaid, counsel may within 10 days submit further typewritten memoranda dealing with the sufficiency and correctness of said findings if they so desire.

/s/ WM. E. ORR,

/s/ FREDERICK G. HAMLEY,

/s/ CHARLES C. MERRILL,

United States Circuit Judges.

[Endorsed]: Filed December 14, 1959.

In the United States District Court for the North-
ern District of California, Southern Division

In Admiralty—No. 20961

In the Matter of the Petition of:

EUGENE C. DREW

For an Order Setting Aside the Forfeiture of His
Wages, Clothing and Effects, for Desertion.

OBJECTIONS AND PROPOSED MODIFICA-
TIONS TO PETITIONER'S PROPOSED
FINDINGS OF FACT AND CONCLUSIONS
OF LAW

1. Respondent United States of America objects generally to Petitioner's proposed findings of fact and conclusions of law, a copy of which is attached hereto as Exhibit A, upon the ground that the proposed findings of fact do not comply with Admiralty Rule 46½ and with the requirements of *Irish v. United States*, 225 F. 2d 3, 8 (9th Cir., 1955), in that the proposed findings are not "so explicit as to give the appellate court a clear understanding

of the basis of the trial court's decision, and to enable it to determine the ground on which the trial court reached its decision."

2. Respondent objects to proposed finding number II upon the ground that it fails to state the essential fact as to whether petitioner, when he "left the SS Mormacgulf and remained away from the vessel," did so without the permission of the master or other person in charge. The definition of desertion is "a quitting of the ship and her service, not only without leave and against the duty of the party, but with an intent not again to return to the ship's duty." *The Italier*, 257 Fed. 712, 714 (2d Cir., 1919), and authorities there referred to. Accordingly a finding as to permission is essential. Respondent proposes to modify proposed finding number II by adding to it the words "all without the permission of the master or other person in charge," in accordance with the admission of the Petitioner in paragraph 5 of his petition.

3. Respondent objects to proposed finding number IV as not showing in what respect the Master's entry of desertion in the log was erroneous, as, for example, that Petitioner had permission to leave and remain away, or that Petitioner, upon leaving and thereafter, never had the intent to remain away, or that Petitioner was justified in some respect. Respondent does not propose explicit terms of modification of this proposed finding since Respondent does not know what conclusion the Court would

reach with respect to the material facts and is unable to determine from the record what facts, if any, constituting suitable modification, have been proved. Respondent notes that if proposed finding number V were sufficiently modified in accordance with Respondent's comments below, similar modification of proposed finding number IV would not be necessary.

4. Respondent objects to proposed finding number V in that it does not, either by itself or in conjunction with any other proposed finding, state an adequate reason for determining that the Master's log entry was erroneous and that Petitioner did not desert or was justified in doing so; and in that the proposed finding does not indicate the nature of the "medical reasons" for leaving the vessel nor show any circumstances bringing the case within any rule under which "medical reasons" might afford a legal excuse or justification for leaving; and in that the proposed finding does not adequately indicate a lack of intent to remain away, not only at the time of leaving but at material times thereafter (*Coffin v. Jenkins*, 5 Fed. Cas. 1188, 1192 No. 2948 [C.C. Mass. 1844, Story, J.]), and in that the proposed finding does not set forth any of the material facts and circumstances bearing upon the existence of "medical reasons" and the existence of intent. Respondent does not propose explicit terms of modification of this proposed finding since Respondent does not know what conclusion the Court would reach with respect to the material facts and

is unable to determine from the record what facts, if any, constituting suitable modification, have been proved.

5. Respondent proposes to modify Petitioner's proposed findings of fact by adding new findings numbers VI and VII, as follows:

VI.

At Port of Spain, Trinidad, on August 14, 1957, the Master granted liberty to the crew, including Petitioner. The sailing time for the next port, Rio de Janeiro, was 6:00 p.m. and it was posted in accordance with custom on the sailing board at least eight hours before sailing time. Under the rules in force and known to Petitioner, liberty would expire and the crew were supposed to be back aboard one hour before sailing. Although Petitioner was on liberty, he spent the afternoon variously about the vessel and on the pier near the vessel. About one-half hour before sailing time, the local agent for the vessel drove onto the pier and talked with Petitioner, pointing down the pier in the direction of the gangway. Petitioner turned around and started toward the gangway while the agent drove on past. When the agent was some distance away, Petitioner turned and ran up the pier in the general direction of the city and was not seen again by those aboard ship. A search disclosed that none of his clothes and effects were left aboard.

VII.

The Petitioner made no attempt to secure medi-

cal treatment in Port of Spain nor any attempt to rejoin his vessel at Rio de Janeiro or any other port but applied to the United States Consul at Port of Spain for repatriation to the United States and was repatriated on consular requisition.

LYNN J. GILLARD,
United States Attorney;

/s/ KEITH R. FERGUSON,
Special Assistant to the
Attorney General;

/s/ GRAYDON S. STARING,
Attorney, Admiralty & Shipping Section, Department of Justice, Proctors for Respondent, United States of America.

Copies of the foregoing Objections and Proposed Modifications to Petitioner's Proposed Findings of Fact and Conclusions of Law were mailed this date to Charles W. Kenady, Jr., Esq; Joseph G. Schumb, Jr., Esq., and Dorr, Cooper & Hays, 260 California Street, San Francisco, California.

Dated: January 27, 1960.

/s/ GRAYDON S. STARING.

EXHIBIT A

In the United States District Court for the Northern District of California, Southern Division

In Admiralty—No. 20961

In the Matter of the Petition of:

EUGENE C. DREW

For an Order Setting Aside the Forfeiture of His Wages, Clothing and Effects, for Desertion.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter coming on regularly to be heard before this Court on the 30th day of June, 1958, and on the 7th day of January, 1959, the Honorable George B. Harris presiding.

The Respondent and Claimant United States of America appearing by Lloyd M. Burke, Esq., United States Attorney; Keith R. Ferguson, Special Assistant to the Attorney General; and Jerry W. Mitchell, Attorney, Admiralty and Shipping Section, Department of Justice, petitioner being present and represented by Court-appointed counsel, and oral and documentary evidence having been introduced by and on behalf of petitioner and the United States; and the Court, having considered all of the evidence and being fully advised in the premises, now makes the following:

Findings of Fact

I.

On July 16, 1957, petitioner signed articles as engine room wiper for a foreign voyage on the SS Mormacgulf which voyage ended on October 4, 1957, at San Francisco, California.

II.

On August 14, 1957, in Port of Spain, Trinidad, petitioner left the SS Mormacgulf and remained away from the vessel and did not rejoin her during the balance of the voyage.

III.

The Master of the SS Mormacgulf on August 14, 1957, entered petitioner as a deserter in the official log book of the vessel and earned wages then due to the petitioner in the amount of \$45.60 were thereafter duly deposited in the registry of this Court.

IV.

Petitioner has presented evidence sufficient to prove that the Master erroneously entered him as a deserter in the official log book.

V.

Petitioner left his vessel on August 14, 1957, for medical reasons and intending to return thereto as soon as his health permitted.

Conclusions of Law

I.

Petitioner has proved that the Master erroneously

entered him as a deserter in the official log book of the SS Mormacgulf.

II.

Petitioner is entitled to an order granting his petition and setting aside the forfeiture for desertion and ordering the Clerk of this Court to draw a check in his favor for the remaining one-third ($\frac{1}{3}$) of the wages deposited in the registry of the Court.

It Is Therefore Ordered that judgment accordingly be entered.

Dated: January .., 1960.

.....,

United States District Judge.

Approved as to form pursuant to Rule 21:

CHARLES W. KENADY,
DORR, COOPER & HAYS,
Proctors for Petitioner.

Disapproved.

LYNN J. GILLARD,
United States Attorney;

KEITH R. FERGUSON,
Special Assistant to
Attorney General;

GRAYDON S. STARING,
Attorney, Admiralty and Shipping Section, Department of Justice, Proctors for Respondent-Claimant.

[Endorsed]: Filed January 27, 1960.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter coming on regularly to be heard before this Court on the 30th day of June, 1958, and on the 7th day of January, 1959, the Honorable George B. Harris presiding.

The Respondent and Claimant United States of America appearing by Lloyd M. Burke, Esq., United States Attorney; Keith R. Ferguson, Special Assistant to the Attorney General; and Jerry W. Mitchell, Attorney, Admiralty and Shipping Section, Department of Justice, petitioner being present and represented by Court-appointed counsel, and oral and documentary evidence having been introduced by and on behalf of petitioner and the United States; and the Court, having considered all of the evidence and being fully advised in the premises, now makes the following:

Findings of Fact

I.

On July 16, 1957, petitioner signed articles as engine room wiper for a foreign voyage on the SS Mormaegulf which voyage ended on October 4, 1957, at San Francisco, California.

II.

On August 14, 1957, in Port of Spain, Trinidad, petitioner left the SS Mormaegulf without permis-

sion of the master or person in charge and remained away from the vessel and did not rejoin her during the balance of the voyage.

III.

The Master of the SS Mormacgulf on August 14, 1957, entered petitioner as a deserter in the official log book of the vessel and earned wages then due to the petitioner in the amount of \$45.60 were thereafter duly deposited in the registry of this Court.

IV.

During petitioner's employment on the SS Mormacgulf in tropical waters his health deteriorated in part due to working conditions in extreme heat in the vessel's engine room and in part due to his own misconduct in over-indulgence with intoxicating beverages.

V.

On August 14, 1957, petitioner, being ill and justifiably concerned about his future well being aboard the vessel, requested medical assistance from the appropriate ship's officers which was refused.

VI.

Petitioner, for good cause, then left the vessel to seek rest and medical assistance on his own.

VII.

Petitioner intended to rejoin the vessel as soon as his health permitted.

VIII.

Thereafter petitioner remained ill and was repatriated aboard another Moore-McCormack vessel to New York where he was treated for fifteen days at the United States Public Health Service Hospital for the illness incurred during his employment.

IX.

Petitioner has presented evidence sufficient to prove that the Master erroneously entered him as a deserter in the official log book.

Conclusions of Law

I.

Petitioner has proved that the Master erroneously entered him as a deserter in the official log book of the SS Mormacgulf.

II.

Petitioner is entitled to an order granting his petition and setting aside the forfeiture for desertion and ordering the Clerk of this Court to draw a check in his favor for the remaining one-third ($\frac{1}{3}$) of the wages deposited in the registry of the Court.

It Is Therefore Ordered that judgment accordingly be entered.

Dated: February 11, 1960.

/s/ GEORGE B. HARRIS,
United States District Judge.

Approved as to form pursuant to Rule 21:

/s/ CHARLES W. KENADY,
DORR, COOPER & HAYS,
Proctors for Petitioner.

Disapproved:

/s/ LYNN J. GILLARD,
United States Attorney;

/s/ KEITH R. FERGUSON,
Special Assistant to
Attorney General;

/s/ GRAYDON S. STARING,
Attorney, Admiralty and Shipping Section, Department of Justice, Proctors for Respondent-Claimant.

Lodged February 2, 1960.

[Endorsed]: Filed February 16, 1960.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below are the originals filed in this Court in the above-entitled case and that they constitute the supplemental record on appeal herein:

Objections and proposed modifications to Petitioner's proposed findings of fact and conclusions of law.

Findings of fact and conclusions of law.

In Witness Whereof, I have hereunto affixed the seal of the above-entitled Court this 16th day of February, 1960.

[Seal] C. W. CALBREATH,
Clerk;

By /s/ J. P. WEBB,
Deputy Clerk.

[Endorsed]: No. 16085. In the United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Eugene C. Drew, Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed February 16, 1960.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for
the Ninth Circuit.